UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v. C.R. No. 91-115-T

STEPHEN SACCOCCIA

MEMORANDUM AND ORDER DENYING MOTION FOR RECONSIDERATION

ERNEST C. TORRES, Chief United States District Judge.

Stephen Saccoccia has filed a motion for reconsideration of the denial of his motion to vacate his sentence pursuant to Fed. R. Civ. P. 60(b). For the reasons hereinafter stated, the motion for reconsideration is denied.

Background

In 1993, Saccoccia was sentenced to 660 years imprisonment after being convicted of 54 counts of racketeering and money laundering. He appealed his conviction and sentence challenging, among other things, the manner in which his offense level was calculated for sentencing purposes. That appeal was denied by the First Circuit. United States v. Saccoccia, 58 F.3d 754 (1st Cir. 1995).

Later, Saccoccia filed a motion, pursuant to 28 U.S.C. § 2255, that included a renewed challenge to the manner in which his

sentence was calculated. That motion was denied on September 15, 1999. Saccoccia v. United States, 69 F. Supp. 2d 297 (D.R.I. 1999). Saccoccia's request for a certificate of appealability was denied by the First Circuit, Saccoccia v. United States, 42 Fed. Appx. 476, 2002 WL 1734169 (1st Cir. 2002), as was his subsequent petition for a writ of certiorari, Saccoccia v. United States, 124 S.Ct. 451 (2003).

On April 14, 2004, Saccoccia filed a motion for relief from judgment, pursuant to Fed. R. Civ. P. 60(b). That motion, again, challenged the manner in which his sentence was calculated. This Court denied that motion, partly, because it was, in effect, a successive § 2255 motion over which this Court lacks jurisdiction unless permission to file it, first, is obtained from the Court of Appeals. 28 U.S.C. § 2255.

Saccoccia seeks reconsideration on the ground that the Court denied his Rule 60(b) motion before it had received his reply to the government's objection. In his reply memorandum, Saccoccia argues that his motion should not be treated as a successive § 2255 petition because it was filed pursuant to Rule 60(b) and challenges only his sentence and not his conviction. That argument lacks merit for two reasons.

First, the fact that Saccoccia's challenge is directed only at his sentence does not transform it into something other than a § 2255 petition. Section 2255 is denominated expressly as a means

for "attacking sentence," 28 U.S.C. § 2255 (emphasis added), and what Saccoccia seeks to vacate is the sentence imposed in 1993.

Even if Saccoccia's motion is construed as a motion to vacate the order denying his previous § 2255 motion, it should be treated as a successive petition. The circuits are divided with respect to whether and under what circumstances a Rule 60(b) motion to vacate a judgment denying habeas relief should be treated as a successive habeas petition. See Rodwell v. Pepe, 324 F.2d 66, 67 (1st Cir. 2003). Some circuits have held that a Rule 60(b) motion should not be treated as a successive habeas petition because it does not seek habeas relief, but, instead, "'seeks only to vacate the federal court judgment dismissing the habeas petition.'" Id. at 69 (quoting Rodriguez v. Mitchell, 252 F.3d 191, 198 (2d Cir. 2001)). On the other hand, other circuits have held "that a Rule 60(b) motion in a habeas case must always be treated as a second or successive habeas petition." Id. at 67.

The First Circuit has adopted an intermediate rule that focuses on whether the motion challenges the underlying conviction or sentence; or, alternatively, whether it challenges the procedure by which the prior habeas petition was denied. Id. at 70.

> When the motion's factual predicate deals primarily with the constitutionality of the underlying state conviction or sentence, then the motion should be treated as a second or successive habeas petition. This situation should be distinguished from one in which the motion's factual predicate deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief. That is the classic function of

> a Rule 60(b) motion [citations omitted] and such a motion should be treated within the usual confines of Rule 60(b).

Id.

Although Rodwell dealt with a § 2254 petition, this principle applies equally to § 2255 petitions. Munoz v. United States, 331 F.3d 151, 152 (1st Cir. 2003) (upholding denial of Rule 60(b) motion challenging sentence under Apprendi on ground that, in effect, it was a successive § 2255 petition).

In this case, Saccoccia does not contend that the order denying his previous § 2255 motion should be vacated on procedural grounds. Once again, his challenge is based on the manner in which his sentence was calculated. That is precisely the type "end run" around the prohibition against successive petitions that was rejected in Rodwell and Munoz. As the Rodwell court stated, whether an attempt to obtain relief from a criminal sentence is characterized as a successive habeas petition "will depend not on the label affixed to a particular motion but on its essence." 324 F.3d at 71.

Since Saccoccia's Rule 60(b) motion is, in essence, a successive § 2255 petition, this Court lacks jurisdiction to entertain it unless and until Saccoccia obtains permission to file it from the Court of Appeals. Accordingly, there is no need for this Court to address whether Saccoccia's motion is timely under either Rule 60(b) or § 2255; or, if so, whether the manner in which

his sentence was calculated violated the holding in Apprendi.

Conclusion

For all of the foregoing reasons, Saccoccia's motion for reconsideration is denied.

IT IS SO ORDERED,

_____
Ernest C. Torres
Chief Judge
Date: August , 2004